

Before the  
COPYRIGHT ROYALTY BOARD  
LIBRARY OF CONGRESS  
Washington, D.C.

In the Matter of

DIGITAL PERFORMANCE RIGHT IN  
SOUND RECORDINGS AND EPHEMERAL  
RECORDINGS FOR A NEW SUBSCRIPTION  
SERVICE

Docket No. 2005-5 CRB DTNSRA

WRITTEN DIRECT STATEMENT OF SOUNDEXCHANGE, INC.

Volume 1 of 6

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Copyright Royalty Board

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October 30, 2006

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**Docket No. 2005-5 CRB DTNSRA**

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Docket No. 2005-5 CRB DTNSRA

**INTRODUCTORY MEMORANDUM TO THE WRITTEN DIRECT CASE OF  
SOUNDEXCHANGE, INC.**

SoundExchange, Inc. ("SoundExchange"), through its undersigned counsel, respectfully submits this Introductory Memorandum to its written direct case in accordance with 37 C.F.R. § 351.4. This Memorandum will describe the contents of SoundExchange's written direct case and briefly summarize the testimony of its witnesses.

**CONTENTS OF SOUNDEXCHANGE'S WRITTEN DIRECT CASE**

Volume 1 contains: (A) this Introductory Memorandum; (B) the Rate Proposal for SoundExchange, as required by 37 C.F.R. § 351.4(b)(3); (C) an Index of SoundExchange's Written Direct Testimony; (D) an Index of the Exhibits to SoundExchange's Written Direct Testimony; and (E) a Certificate of Service. Pursuant to 37 C.F.R. § 350.4(a) and the Copyright Royalty Board's Orders dated August 18, 2006 and September 28, 2006, SoundExchange is filing an original, five copies, and an electronic copy of the materials in Volume 1.

SoundExchange is serving Volume 1 on opposing outside counsel.

Volume 2 contains SoundExchange's written direct witness testimony and public exhibits. Pursuant to 37 C.F.R. § 350.4(a) and the Copyright Royalty Board's Orders dated August 18, 2006 and September 28, 2006, SoundExchange is filing an original, five copies, and an electronic copy of the materials in Volume 2 (excluding two exhibits that contain restricted and confidential information), which SoundExchange will seek leave to amend upon entry of a protective order. SoundExchange is serving Volume 2 (including the two exhibits that contain restricted and confidential information) on opposing outside counsel.

Volume 3 contains the designated written direct testimony, oral direct testimony, and oral cross-examination of SoundExchange witness Michael Pelcovits in Docket No. 2005-1. Pursuant to 37 C.F.R. § 350.4(a) and the Copyright Royalty Board's Orders dated August 18, 2006 and September 28, 2006, SoundExchange is filing the original, five copies, and an electronic copy of the testimony in Volume 3 (excluding materials that were designated as Restricted in Docket No. 2005-1), which SoundExchange will seek leave to amend upon entry of a protective order. SoundExchange is serving Volume 3 (including the Restricted materials) on opposing outside counsel.

Volume 4 contains the exhibits to the designated oral testimony of Michael Pelcovits from Docket No. 2005-1. Pursuant to 37 C.F.R. § 350.4(a) and the Copyright Royalty Board's Orders dated August 18, 2006 and September 28, 2006, SoundExchange is filing the original, five copies, and an electronic copy of the exhibits in Volume 4 (excluding materials that were designated as Restricted in Docket No. 2005-1), which SoundExchange will seek leave to amend upon entry of a protective order. SoundExchange is serving Volume 4 (including the Restricted materials) on opposing outside counsel.

Volume 5 contains the designated written direct testimony, oral direct testimony, and oral cross-examination of SoundExchange witness Barrie Kessler in Docket No. 2005-1. Pursuant to 37 C.F.R. § 350.4(a) and the Copyright Royalty Board's Orders dated August 18, 2006 and September 28, 2006, SoundExchange is filing the original, five copies, and an electronic copy of the testimony in Volume 5 (excluding materials that were designated as Restricted in Docket No. 2005-1), which SoundExchange will seek leave to amend upon entry of a protective order. SoundExchange is serving Volume 5 (including the Restricted materials) on opposing outside counsel.

Volume 6 contains the exhibits to the designated written and oral testimony of Barrie Kessler from Docket No. 2005-1. Pursuant to 37 C.F.R. § 350.4(a) and the Copyright Royalty Board's Orders dated August 18, 2006 and September 28, 2006, SoundExchange is filing the original, five copies, and an electronic copy of the exhibits in Volume 6 (excluding materials that were designated as Restricted in Docket No. 2005-1), which SoundExchange will seek leave to amend upon entry of a protective order. SoundExchange is serving Volume 6 (including the Restricted materials) on opposing outside counsel.

## SUMMARY OF THE WRITTEN TESTIMONY OF SOUNDEXCHANGE'S WITNESSES

SoundExchange's Written Direct case consists of the testimony of the following expert and fact witnesses.

### A. Expert Witnesses

James Griffin is Managing Director of OneHouse LLC and a leading expert and frequent speaker on the digital delivery of entertainment. His testimony for SoundExchange's direct case will describe cable and satellite television subscription services' use of music channels in the promotion and sale of their services and the value that the music channels have for cable and satellite television subscribers. Mr. Griffin describes the high-quality listening experience that these services provide and the broad choices they offer compared to broadcast radio. Mr. Griffin also explains how the music services promote XM's and Sirius's brands; differentiate DirecTV and DISH from competitors and, in some cases, differentiate their higher-tiered services from their basic packages; and provide subscribers with choice in quality programming without having to buy CDs or subscribe to other services.

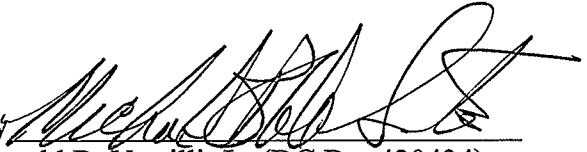
Michael Pelcovits, Ph.D. is a principal of the consulting firm Microeconomic Consulting & Research Associates, Inc. ("MiCRA"), which specializes in the analysis of regulatory economics. His testimony for SoundExchange's direct case will use the methodology he testified to in Docket No. 2005-1 CRB DTRA. SoundExchange is introducing that testimony as designated testimony in this proceeding. He compares webcasting services, which were the subject of his designated testimony, to the satellite television subscription services at issue in this proceeding and concludes that the services' underlying value to their listeners is, in many respects, similar.

Dr. Pelcovits then proposes a rate of the greater of the same percentage of revenue he suggested in the webcasting proceeding and a per subscriber fee based on the rate he proposed in the webcasting proceeding. However, because the cost that subscribers pay for cable and satellite television services as a whole does not necessarily reflect the value they attach to the music channels in particular, Dr. Pelcovits determines that a proxy for the value they place on the music can be determined from the amount of time they spend listening to the music channels. Using the best available estimate of the hours per month that cable and satellite television subscribers listen to the music channels provided on those services, he identifies the ratio of the hours per month that webcasting subscribers listen to music over their subscription service (45) to the hours per month that cable and satellite television subscribers listen to music over their subscription service (8). Multiplying the per subscriber rate he proposed in the webcasting proceeding (\$1.37) by this ratio (8:45, or 0.18), Dr. Pelcovits determines the appropriate per subscriber rate for cable and satellite television services (25¢ per subscriber per month).

#### **B. Fact Witness**

Barrie Kessler is the Chief Operating Officer of SoundExchange, Inc. In Docket No. 2005-1 CRB DTRA, her testimony described how SoundExchange collects and distributes royalties. That testimony is designated in this proceeding. Her testimony in this proceeding also requests that SoundExchange remain the sole collection and distribution agent, states that the existing regulations should be amended to account for the additional issues discussed in her testimony in Docket No. 2005-1 CRB DTRA, and provides factual support for SoundExchange's position that neither the Sirius-EchoStar service nor the Capstar service is entitled to the rates available for Preexisting Subscription Services.

Respectfully submitted,

By 

Donald B. Verrilli, Jr. (DC Bar 420434)

Thomas J. Perrelli (DC Bar 438929)

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Counsel for SoundExchange, Inc.

Dated: October 30, 2006



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Digital Performance Right In Sound )  
Recordings and Ephemeral Recordings )  
For a New Subscription Service )  
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Docket No. 2005-5 CRB DTNSRA

**RATE PROPOSAL FOR SOUNDEXCHANGE, INC.**

Pursuant to 37 C.F.R. § 351.4(a)(3), SoundExchange, Inc. ("SoundExchange"), through its undersigned counsel, hereby proposes the following rates for (1) the digital audio transmission of sound recordings by new subscription services for transmission by a satellite or cable television service to its residential customers ("New Television Services" or "Services") that will be operating under the statutory licenses set forth in 17 U.S.C. § 114(d)(2)(C), pursuant to 17 U.S.C. § 114(f)(2)(c); (j)(8); and (2) the making of ephemeral phonorecords necessary to facilitate transmissions by the New Television Services, 17 U.S.C. § 112(e), during the period January 1, 2006 through December 31, 2010. The Services shall not include any services provided by these or any other companies to the extent that the activity of such companies falls within the statutory definition set out in 17 U.S.C. § 114(j)(10) or (11), or are set in other rate proceedings. Pursuant to 37 C.F.R. § 351.4(a)(3), SoundExchange reserves the right to alter or amend its rate proposal prior to or at the time of submission of findings and conclusions if warranted by the record.

## I. ROYALTY RATES

Each New Television Service shall pay a monthly fee ("Royalty") (to cover both the 17 U.S.C. § 114(d)(2) performance license and the § 112(e)(1) license for making ephemeral copies) as follows:

1) The Royalty Amount. For each month, the Royalty shall equal the greater of: 30% of all revenue paid or payable to the New Television Services from a satellite or cable television service for distribution of the licensed service to the satellite or cable television service's residential customers; or \$.25 per month for each residential customer who subscribes to the underlying cable or satellite television service, as adjusted pursuant to the CPI Increase set out in (3) below.

2) Subscriber. For purposes of the calculation of the royalty amount set out in (1) above, a "residential customer who subscribes to the underlying cable or satellite television Service" means a residential customer who subscribes for all or for any part of the month, or to whom the Service is otherwise delivered without a fee (*e.g.*, during a free trial period).

3) CPI Increases. Each year of the license period, beginning on January 1, 2008, the per subscriber rate shall increase according to the percent change in the CPI-U from November 1 of the year two years prior to the year in which payments are to be made to November 1 of the year prior to the year in which payments are to be made. For example, in January 2008 the rate shall be adjusted based on the percentage increase in the CPI-U from November 1, 2006 through November 1, 2007.

4) Allocation of Royalty Payments. To the extent that more than one digital audio service is providing digital audio services to the same underlying cable or satellite

television service, the New Television Services subject to this statutory license will pay a proportionate share established by a ratio of the number of channels the New Television Service is offering divided by the total number of channels of digital audio services offered on the underlying cable or satellite television service.

5) Ephemeral Fees. With respect to each of the rates specified above, the royalty payable under 17 U.S.C. § 112(e) for the making of ephemeral copies used solely by the New Television Service to facilitate transmissions for which it pays royalties shall be deemed to be included within, and to comprise 8.8% of, such royalty payments.

6) Minimum Annual Fee. There shall be a recoupable but non-refundable minimum annual fee for each eligible New Television Service during the year of \$100,000.00. The annual minimum fee shall be due by January 31st of each year; provided, however, that if a service does not make any transmissions during January but thereafter commences transmissions, then the minimum annual fee shall be due by the last day of the month in which the service commences making transmissions under the statutory license.

## **II. TERMS**

SoundExchange proposes that many, but not all of the terms of the current regulations, 37 C.F.R. Part 262, be maintained in their current form. SoundExchange proposes those changes to the current regulations described in the testimony of Barrie Kessler, as well as all such changes needed to implement the rate proposal discussed above. Pursuant to Section 351.4(a)(3), SoundExchange reserves the right to propose alternative or additional terms prior to or at the time of submission of findings and conclusions if warranted by the record.

Respectfully submitted,

By 

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Dated: October 30, 2006

**Index of SoundExchange Witness Statements**

<b>Tab</b>	<b>Witness</b>	<b>Title</b>
1	James Griffin	Managing Director, OneHouse LLC
2	Michael Pelcovits	Principal, Microeconomic Consulting & Research Associates, Inc.
3	Barrie Kessler	Chief Operating Officer, SoundExchange, Inc.

### **Index of SoundExchange Exhibits**

<b>Exhibit No.</b>	<b>Sponsored By</b>	<b>Description</b>
SX Ex. 001 DP	Barrie Kessler	Declaration of Barry M. Massarsky in Docket No. RM 2005-2 (Aug. 26, 2005)
SX Ex. 002 DP	Barrie Kessler	Motion by SoundExchange for Referral of Novel Material Question of Substantive Law Concerning the Preexisting Subscription Service Compulsory License in Docket No. 2006-1 CRB DSTRA (May 4, 2006)
SX Ex. 101 DR	Barrie Kessler	SoundExchange correspondence with DMX Music (RESTRICTED)
SX Ex. 102 DR	Barrie Kessler	SoundExchange correspondence with Sirius Satellite Radio Inc. (RESTRICTED)

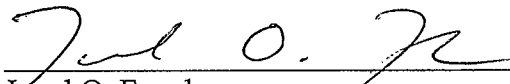
## CERTIFICATE OF SERVICE

I, Jared O. Freedman, hereby certify that, by agreement of the parties, a copy of the foregoing **Written Direct Statement of SoundExchange, Inc.** (without exhibits and designated testimony) is being served this 30th day of October, 2006, by electronic mail to the persons listed below. In, addition, by agreement of the parties, a copy of the foregoing Written Direct Statement of SoundExchange, Inc. (with exhibits and designated testimony) is being served by overnight delivery on the persons listed below.

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